SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term 1968
No. 80

EMMETT CANARAD, CYRIL MYERS, PETER STAFFORD, and GEORGE MILLER,

Petitioners,

vs.

STATE OF CALIFORNIA, COURT OF APPEAL, SECOND APPELLATE DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District

BRIEF OF RESPONDENT IN OPPOSITION

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BRIEF OF RESPONDENT IN OPPOSITION

Preliminary Statement

Petitioners seek a writ of certiorari from this Court to the California Court of Appeal, Second Appellate District, Division Four, to review its decision affirming judgments of conviction of conspiracy. The opinion of the Court of Appeal, filed December 26, 1967, is reported at 257 A.C.A. 500 (1967) [65 Cal. Rptr. 15] (hearing denied by the California Supreme Court). The Petition for Writ of Certiorari was docketed on May 9, 1968. This Brief in Opposition is filed pursuant to the Court's request contained in its letter of August 12, 1968.

Jurisdiction

Jurisdiction in the present Petition for Writ of Certiorari is invoked presumably pursuant to Title 28, United States Code, section 1257(3).

Questions Presented

By letter dated August 12, 1968, the Court requested this Brief in Opposition without specifying any particular issue. The following issues are raised by the Petition:

1. Did the trial court err in permitting cross-examination of petitioner Peter Stafford, a police officer, as to testimony given by him, allegedly under compulsion, before the Grand Jury?

2. Was petitioner Stafford denied the right to a fair trial and due process of law, in violation of the Fourth and Fourteenth Amendments to the United States Constitution, by reason of his detention, the allegedly unlawful search of his person, and the use of the fruits of such search at the trial?

3. Did the trial court err in denying a mistrial sought on the basis of unfavorable newspaper and television publicity during the pendency of the trial?

4. Did the interception of telephone conversations made by petitioner Stafford and a co-defendant, and the use in evidence of recordings of the conversations, violate the Fourth, Fifth, and Sixth Amendments to the United States Constitution and the Federal Communications Act?

5. Was the evidence insufficient to sustain the judgments of guilty as to any of the petitioners?

6. Did the trial court err in excluding evidence as to the disposition of the cases in which bookmaking arrests were made during the investigation in question?

Statement of the Case

In an indictment and an amended indictment filed by the Grand Jury of Los Angeles County, petitioner Peter E. Stafford and Henry DeMaddalena, Los Angeles Police Department officers, and Emmett Canard, Cyril Myers, George Miller, and Maury Adler were charged in Count I with the felony of conspiracy to offer and give bribes to executive officers of the State of California in violation of California Penal Code section 67, to ask for and receive bribes for officers, employees, and appointees of the City of Los Angeles in violation of California Penal Code section 68, to engage in bookmaking in violation of California Penal Code section 337a, and to obstruct justice and the due administration of the laws pertaining to bookmaking and bribery in violation of California Penal Code section 182.5. Seven overt acts were alleged. (Clerk's Transcript [hereinafter referred to as Cl. Tr.] pp. 1-2, 6-7.)

In Counts II and III, Henry De Maddalena was charged with the felony of offering and giving a bribe to an executive officer of the State of California, Joseph Gunn, a Los Angeles Police Department officer, with the intent to influence Gunn's actions in the performance of his duties as a member of the Los Angeles Police Department, in violation of California Penal Code section 67. (Cl. Tr. pp. 3-4, 8-9.)

The motions of each defendant pursuant to California Penal Code section 995 to set aside the indictment

were denied, and the defendants pleaded "Not Guilty." (Cl. Tr. p. 17.) Petitioner Stafford's motion to suppress evidence was denied (Cl. Tr. p. 42), and motions for mistrial were denied. (Cl. Tr. pp. 51, 57.)

After a jury trial petitioners were found guilty as charged, and the jury returned a special verdict finding that the objects of the conspiracy were those charged in the indictment. (Cl. Tr. pp. 142-43.) Motions for new trial were made by petitioners and were denied by the trial court. (Cl. Tr. pp. 193-97.)

As to petitioner Stafford, probation was denied and he was sentenced to state prison for the term prescribed by law, which is one to fourteen years. (*See* Cal. Pen. Code §§ 67, 68, 182.) (Cl. Tr. p. 203.) As to petitioner Canard, proceedings were suspended and probation was granted for five years on condition that he spend ninety days in county jail and pay a fine of $1,000 plus penalty assessment. (Cl. Tr. p. 202.) As to petitioner Myers, proceedings were suspended and probation was granted for five years on condition that he spend six months in county jail and pay a fine of $5,000 plus penalty assessment. (Cl. Tr. p. 201.) As to petitioner Miller, proceedings were suspended and probation was granted for five years on condition that he spend sixty days in county jail and pay a fine of $2,500 plus penalty assessment. (Cl. Tr. p. 199.)

Petitioners filed timely notices of appeal. (Cl. Tr. pp. 204, 206-07, 210.) As to each, bail on appeal was set and stay of execution of the judgment was granted pending appeal. (Cl. Tr. pp. 199, 201-03.) Their convictions were affirmed by the Court of Appeal. *People v. Canard*, 257 A.C.A. 500 (1967) [65 Cal. Rptr. 15].

Timely petition for hearing in the California Supreme Court was filed and was denied on February 19, 1968. 68 A.C. #8, Minutes, p. 3. A petition to recall the remittitur was denied by the Court of Appeal. Petitioners' applications to recall the remittitur and to stay execution of judgment were denied by the California Supreme Court on May 6, 1968. The trial court, the Superior Court of California in and for the County of Los Angeles, has granted a stay of execution to permit the timely filing of the present Petition for Writ of Certiorari.

Statement of Facts

The evidence is accurately summarized in the opinion of the Court of Appeal, and the following summary of the facts is taken from that opinion. See *People v. Canard,* 257 A.C.A. 500 (1967) [65 Cal. Rptr. 15]. Pertinent portions of the record are set out in more detail in the arguments.

> "Defendants Stafford and De Maddalena were members of the Los Angeles Police Department. Stafford was a supervising sergeant assigned to the bookmaking detail of the Central Vice Division. He was an acknowledged expert in bookmaking law enforcement. Late in 1963, upon the recommendation of Stafford, Officer De Maddalena was transferred to the Central Vice bookmaking detail to work under Stafford. On February 1, 1964, De Maddalena and Officer Joseph Gunn were assigned as partners to work the West Los Angeles area." 257 A.C.A. at 504 [65 Cal. Rptr. at 18].
>
> "On February 15, Gunn and De Maddalena were on an assignment at the Kismet Bar, when

De Maddalena stated, 'Here's some money for you.' He handed Gunn a $50 bill and told him 'It's for your New York vacation!' Gunn asked what he had to do for the money and De Maddalena said, 'You won't have to do anything. You won't know anything about anything. All you have to do is get your money from me. This concerns something that is out of our district and we can go ahead and make our arrests every month and it won't be any concern to us.'

"After leaving De Maddalena, Gunn went directly to Lieutenant Wilson, the acting division commander, and told him what had transpired. At a meeting held on February 17, with Captain Nelson (the administrative vice-commander) and Captain Mills (the internal affairs commander) both in attendance, Gunn was instructed to go along with De Maddalena in order to find out all the officers and criminal elements involved. He was to report what he found out to Captain Mills.

"The next time Gunn saw De Maddalena was on February 18. De Maddalena told him he would be paid $200 once a month. On February 20, outside the Clown Town Bar, De Maddalena, then in a state of intoxication, showed Gunn the last page of his personal notebook. It contained letters and numerals. He told Gunn it was a code and represented the phone numbers for 17 'front and back offices' for Cyril Myers, the biggest sports bookmaker in Los Angeles.

"'Front offices' and 'back offices' are terms used to describe places where illegal bets are received and recorded by bookmakers. A front of-

fice is staffed by a clerk who takes bets phoned in by bettors and temporarily records them on objects which are quickly destructible. The back office is the place where the bets are thereafter permanently recorded, usually on pads called betting markers. Periodically, the back office clerk telephones the front office clerk, and the latter relays the bets received and then destroys his record.

"After showing Gunn his notebook, De Maddalena stated that Gunn's job would be to periodically check 'the telephone board' at Administrative Vice." 257 A.C.A. at 505 [65 Cal. Rptr. at 18-19].

"When an Administrative Vice officer wants the address for a telephone number of a suspected bookmaking establishment, he writes the number on a clipboard referred to as 'the telephone board.' It is kept by an employee in the administrative section of the department. By calling the intelligence division (who would in turn contact the telephone company), the employee secures the address of the telephone for the investigating officer." 257 A.C.A. at 505-06 [65 Cal. Rptr. at 19].

"De Maddalena told Gunn that he should bring the telephone numbers he got off the telephone board to him to check against the numbers in his notebook. If they matched one of the numbers of Cyril Myers, he would warn him about the impending investigation.

"On February 22, De Maddalena told Gunn that the payoff would be on the 15th of the month.

He stated, on February 26, that Sergeant Stafford was part of the deal. The next day he said that Canard, of the Crown Hill organization at Third and Lucas Streets, and some other bookmakers were also involved.

"On February 27, De Maddalena said he had to attend a meeting in Pasadena with Myers and that Stafford would probably be there. Two days later he told Gunn about having gone to the meeting. He said that Stafford, Myers and Maury Adler, who managed Myer's [sic] dress shop at Wilshire and Oxford, were at the meeting; Myers told them that he had changed his phone numbers; Myers also agreed to pay them $200 a month. De Maddalena further stated that he had mentioned Gunn's name at the meeting.

"On March 4 De Maddalena told Gunn that five bookmakers, including Myers and Canard, were paying them off; Pete Stafford had only about four months to go in Central Vice; when he finished his tour of duty, he and Gunn would be the bosses of the operation; Stafford was picking up all the money and making all the payoffs; because Stafford had numerous ways 'to cut the pot,' he couldn't afford to give them more than $200 each; Stafford himself cleared about $700 or $800 a month.

"On the same date, De Maddalena instructed Gunn to copy down certain telephone numbers. He gave Gunn 16 numbers. Some, he said to put under Crown Hill, including DU 9-0888. Some, he told Gunn to put under Cyril Myers name, including a back office number, PL 4-2261 and a front

office number, RE 3-4745. Madison 6-4572 was to be put under the name George Miller. Gunn was also given Myers' and Stafford's home numbers and Adler's numbers at Myers' dress shop. De Maddalena said that, if any of the numbers came up and he was not around, Gunn was to call 'Cy, Maury or Pete' and warn them. To identify himself when he called, he was instructed to say 'this is Mr. Harris calling.'" 257 A.C.A. at 506 [65 Cal. Rptr. at 19-20].

"On March 9, De Maddalena told Gunn he was going to see George Miller; he would get some money from Miller for protecting a Barboudi game Miller was going to open up. On March 11, Gunn was told by De Maddalena that he planned to see Stafford on Sunday to pick up their money.

"Gunn reported everything De Maddalena had told him to his superiors. On March 12, following a plan set up by them, Gunn went at 11:15 a.m. to Administrative Vice and picked up two phone numbers from Lt. Wilson. They were numbers for a back office and a front office listed to Cyril Myers. The front office number was RE 3-4745. He immediately went down to the Internal Affairs Division and from there dialed Pete Stafford's telephone extension. . . ." 257 A.C.A. at 507 [65 Cal. Rptr. at 20].

A conversation took place which is set forth in 257 A.C.A. at pages 507-08 [65 Cal. Rptr. at 20].

"At 11:21 a.m. Stafford was observed leaving the Central Vice office. He went to the lobby of the police building and entered a public telephone booth.

"On the morning of March 12 Sergeant Safford (not to be confused with defendant Stafford) had been instructed by Lt. Wilson to place Apartment 9 at 12036 South Vermont Avenue under observation. Safford had received the phone number PL 4-2261 in connection with that address. At 11:45 a.m. he observed a man carrying a bundle leave the apartment.

"The man was Wayne Galligan. He was operating a back office from that location. He had received a telephone call telling him to leave.

". . .

"In February and March, Canard and a woman known as Michelle Parks were staying in Apartment 5, at 250 South Reno Street. The telephone number of their apartment was DU 9-0888. At 1 a.m. on March 13, pursuant to instructions from Lt. Wilson, Sergeant Safford went to the Reno Street apartment driving an undercover police car. It had been assigned to him since August 1963. The license number was NZK002. As he entered the hallway of the apartment building, he observed Michelle Parks. She approached the door of Apartment 5, turned and looked at him, and then entered the apartment. Safford left the building, circled the block on foot and then returned to his car. After driving a few blocks, he noticed a vehicle without lights following him. When it pulled over and parked, he turned and drove past it. Michelle Parks was standing near the car." 257 A.C.A. at 508 [65 Cal. Rptr. at 20-21].

Later that same morning petitioner Stafford made two telephone calls from the office of Central Vice.

These conversations of Stafford's were introduced in evidence indicating that he had made inquiry with the Department of Motor Vehicles and the vehicle dispatcher office of the Los Angeles Police Department regarding the police vehicle seen in the vicinity of Canard's home. 257 A.C.A. at 509-10 [65 Cal. Rptr. at 21-22].

> "On March 15, Stafford and De Maddalena were observed conversing at a car wash in De Maddalena's car. The next day De Maddalena gave Gunn two $100 bills.
>
> "Pursuant to instructions from their superiors, on March 20 at 8:30 a.m., Lt. Hill, Sergeant Judd and two other officers, approached defendant Stafford after he dropped his son off at school. He was driving a police vehicle. He was told he was assigned to Lt. Hill for the day; that he was the subject of an investigation. They picked up his notebooks, which were lying on the seat of the car, and drove him to a motel where he was searched and then held incommunicado for the next few hours.
>
> "At 10 a.m. Lt. Wilson sent 75 policemen out to the vicinity of the suspected front and back offices, the addresses of which their investigation had uncovered. Those sent to the back offices were instructed that, after receiving a radio signal at about 11:30 a.m., they were to arrest anyone who left the locations. The officers going to the front offices were told to attempt to 'stiff-in' (to place) a wager over the telephone.
>
> "The officers arrested Canard as he left Apartment 5 at the Reno Street apartment building.

They found bookmaking 'owe sheets,' marker pads and two adding machines in the apartment. The phone number there—DU 9-0888—was in Stafford's notebook under Canard's name. It was also in De Maddalena's notebook.

"In all, the investigation undertaken that day revealed evidence of bookmaking at 10 locations the telephone numbers of which both De Maddalena and Stafford had in their notebooks. At one front office the officers were able to 'stiff-in' a bet." 257 A.C.A. at 510 [65 Cal. Rptr. at 22].

Around 11:30 a.m. while the field investigation of March 20 was still in progress, Officer Gunn called Myers and Adler and, using the Harris code, informed them that their back office would be hit. 257 A.C.A. at 510-11 [65 Cal. Rptr. at 22]. These conversations are set forth in 257 A.C.A. at 511-14 [65 Cal. Rptr. at 22-24].

"De Maddalena testified that, shortly after he transferred to Central Vice, Stafford gave him $100, saying 'this is from some people that are taking care of us.' Tommy Canard's name was mentioned. When he went to Administrative Vice in January 1964, Stafford told him he would be paid for protecting Canard, Cyril Myers and others, by watching the Administrative Vice telephone board. Stafford gave him the numbers to be protected and he put them on the last page of his notebook. He received $200 from Stafford for performing this service. The $50 he gave to Gunn was given to him by Stafford with specific instructions to give it to Gunn. In February 1964, he met with Stafford, Myers and Adler at the

Westward Ho Restaurant in Pasadena. At this meeting they agreed to use 'Mr. Harris' as a code name. Gunn was given the $200 for 'going along with the play.' He received the money from Stafford at an Arcadia car wash. In February or March, Stafford told him that George Miller was opening a gambling operation in the downtown area and would also pay for information." 257 A.C.A. at 514 [65 Cal. Rptr. at 24-25].

"One of the front offices hit by the police on March 20 was the Nelson Jewelry Company, located in room 1106 at 215 West Fifth Street. Patricia Locricchio was taking and recording bets from that location. Their phone number appeared in Stafford's and De Maddalena's books. In February and March the rent for room 1106 was paid by a check drawn on the Guardian Bank. Ann Lieber, an employee of the landlord of room 1106, received the check. She put the number 1106 in one corner and deposited it. On April 20 defendant Miller went to the Guardian Bank and asked to see the check, giving the date, drawer and its amount. He said he wanted to see it for a friend named Don. A secretary handed him the check and then turned to take a telephone call. When she came back to Miller, she saw that the check had been written over and the number 1106 had been erased. Miller said 'the handwriting wouldn't be the same on this one as it was on this—on this now as it was in its original form.'

"Stafford testified, denying any involvement in the conspiracy alleged. As part of his job, it was his practice to keep the phone numbers of sus-

pected bookmakers in his notebook. Many of the numbers were supplied to him by informers. He and De Maddalena met Adler and Myers simply by chance at the Westward Ho Restaurant in February 1964, and were invited to dinner by them. They did not discuss bookmaking. He was acquainted with Myers before that time and knew he was a gambler. On March 16, when he was at the car wash, he and De Maddalena were discussing De Maddalena's family and health problems. He did not give De Maddalena any money nor did he receive any money from any of the other codefendants.

"Stafford remembered receiving the telephone call from Gunn on March 12. At the time he thought Gunn wanted to get hold of De Maddalena but that he was double talking because he was talking in front of a superior. He thought the phone number mentioned by Gunn was where Gunn thought De Maddalena might be reached. He went to a phone booth to call the Lake Club which De Maddalena frequented. He used the public phone because personal calls are not permitted from the office. He talked with Ralph Dark who said De Maddalena was not there." 257 A.C.A. at 515 [65 Cal. Rptr. at 25].

"Stafford further testified that on March 13 he found a mug book with a note attached, 'Possibly came out of NZK 002, a 1962 blue Ford.' He did not know where it belonged so he tried Motor Vehicles. When he later called the motor pool to inquire about a car he had used a few days earlier,

he gave the above license number by mistake." 257 A.C.A. at 515-16 [65 Cal. Rptr. at 25].

"In his testimony Stafford stated that he knew Miller. He was reputed to be a gambler. He sometimes got information from him. Miller had once published 'Post and Paddock' which contained tips on the races. He also knew Canard, who was a bartender and small time gambler. Canard also gave him information.

"Of the notation 'Phone Cy' found in his notebook, Stafford testified that the Cy referred to an informer named Cyzeck. His notebook entry 'make meet with Cy, Maury, Hank' referred to Gordon Jones (the Cy being G. J.) Maury Rissman and Officer Hank Weldon.

"Adler testified, acknowledging that he and Myers had dinner at the Westward Ho with Stafford and De Maddalena. According to Adler they met by chance and did not discuss gambling. He knew his employer Myers was a gambler. Concerning the March 20th telephone call he had received, Adler stated that he did not understand what the caller was talking about, 'so he just listened' attempting to recognize the voice. There were two offices over the dress shop. One was referred to as a back office. It had no connection however with bookmaking. He thought the caller might be a robber. He had been a robbery victim twice in the past.

"In his testimony Myers stated that, when he received the call on March 20, he was suspicious and just tried to keep the person talking.

"Miller testified that he knew plenty of bookmakers. He gave Stafford the numbers of several of them to keep him from bothering the customers at his fruit company. He had no connection with room 1106 at 215 West 5th Street. He had gone to the Guardian Bank on April 20 to do a favor for a friend named Dominic, a reputed bookmaker, who told him he bought a money order there and wanted it back. When the woman at the bank refused to let him have it, he did a 'foolish thing,' writing over it. He did not, however, erase the number '1106' on the check.

"Canard did not testify." 257 A.C.A. at 516 [65 Cal. Rptr. at 25-26].

ARGUMENT

I

THE TRIAL COURT DID NOT ERR IN PERMITTING CROSS-EXAMINATION OF PETITIONER STAFFORD AS TO TESTIMONY GIVEN BY HIM BEFORE THE GRAND JURY

Petitioners claim that petitioner Peter Stafford, a police officer employed by the City of Los Angeles, was improperly cross-examined, over defense objection, as to his prior testimony before the Grand Jury of Los Angeles County.

Petitioners base their contention that this prior testimony was given under compulsion upon evidence that (1) Stafford had previously been taken to a motel room without advice as to his constitutional rights, had been ordered to remove his clothes and was searched (including his rectum), and had been interrogated and held incommunicado for several hours; (2) Stafford had been subpoenaed to testify before the Grand Jury and had been told that he would be dismissed from his position as a police officer if he claimed the privilege against self-incrimination. (Petition, p. 10.)

Petitioners rely almost exclusively upon this Court's recent decision in *Garrity v. New Jersey,* 385 U.S. 493.

A. This Court's Ruling in Garrity v. New Jersey, 385 U.S. 493, Should Not Be Applied Retroactively.

The threshold issue presented by petitioners' contention is whether the principles of the *Garrity* case, which was decided on January 16, 1967, should be applied retroactively to the present case.

In affirming petitioners' convictions, the Court of Appeal expressly reserved decision as to this issue and noted:

> ". . . Whether or not that decision will be so applied has not yet been decided by the Supreme Court of this state. We need not decide it here . . ."
> *People v. Canard, supra,* 257 A.C.A. 500, 524 (1967) [65 Cal. Rptr. 15, 31].

The California Supreme Court has not yet ruled whether *Garrity* is to be given retroactive application or prospective application only.

The events which form the basis of petitioners' conspiracy convictions transpired in February and March of 1964. (Cl. Tr. pp. 6-7.) According to Stafford's testimony at the trial, his appearance before the Grand Jury was on April 22, 1964. (Reporter's Transcript [hereinafter referred to as Rep. Tr.] p. 2308.) Petitioners' trial took place in April and May of 1965 (Rep. Tr. p. A-2), and the *Garrity* case was decided during the pendency of petitioners' appeal before the Court of Appeal. *People v. Canard, supra,* 257 A.C.A. 500, 522 (1967) [65 Cal. Rptr. 15, 29-30].

In *Garrity v. New Jersey, supra,* 385 U.S. 493, 500, this Court held that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic." In the companion case of *Spevack v. Klein,* 385 U.S. 511, relied upon by the Court in *Garrity* (385 U.S. at 497), the Court held that an attorney could

not be disbarred because he invoked his privilege against self-incrimination in a proceeding to discipline him from professional misconduct.

Spevack squarely overruled the case of *Cohen v. Hurley,* 366 U.S. 117. The *Cohen* case, decided in 1961, was "practically on all fours" with *Spevack* but had led the Court to the opposite conclusion, mainly because *Cohen* antedated this Court's holding in *Malloy v. Hogan,* 378 U.S. 1, that the self-incrimination clause of the Fifth Amendment was applicable to the states by reason of the Fourteenth Amendment. *Spevack v. Klein, supra* at p. 513.

Spevack and *Garrity* are based largely upon the principles of *Malloy v. Hogan, supra,* and *Griffin v. California,* 380 U.S. 609.

See *Garrity v. New Jersey, supra,* 385 U.S. 493, 497;

Spevack v. Klein, supra, 385 U.S. 511, 514-15.

Malloy was decided nearly two months after Stafford's disputed appearance before the Grand Jury. *Griffin,* which was decided on April 28, 1965, during the course of the trial (Cl. Tr. p. 54), has been held not to apply retrospectively. *Tehan v. Shott,* 382 U.S. 406, 419.

This Court has set forth the following considerations that affect the judgment whether a case reversing prior doctrines in the area of criminal law should be applied only prospectively:

> ". . . (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and

(c) the effect on the administration of justice of a retroactive application of the new standards. . . ."

Stovall v. Denno, 388 U.S. 293, 297.

When these criteria are applied to the doctrine of the *Garrity* case, that the prosecution may not use at trial the statements of a police officer who has been advised that if he refuses to answer questions which might incriminate him he will be subject to removal from his position (385 U.S. at pp. 494-95), it is readily apparent that the considerations which in the past have led this Court to limit the applicability of new rules of criminal procedure to future cases have equal force in the present situation.

See DeStefano v. Woods, 392 U.S. 631;
Stovall v. Denno, supra, 388 U.S. 293;
Johnson v. New Jersey, 384 U.S. 719;
Tehan v. Shott, supra, 382 U.S. 406;
Linkletter v. Walker, 381 U.S. 618.

These considerations all militate against giving retroactive application to the doctrine announced in *Garrity.*

"[T]he purpose to be served by the new standards" (388 U.S. at p. 297) will be fully accomplished by prospective application. The Court's stated purpose in *Garrity* was to preclude imposition on the defendant police officers of a choice "between self-incrimination or job forfeiture." *Garrity v. New Jersey, supra,* 385 U.S. 493, 496.

As the Court stated in *Tehan v. Shott, supra,* 382 U.S. 406, the purpose behind the privilege against self-incrimination is to compel constitutionally the prosecution "to establish guilt by evidence independently and

freely secured, and '. . . not by coercion prove a charge against an accused out of his own mouth." *Malloy v. Hogan, supra,* 378 U.S. 1, 8.

> ". . . [T]he basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load.' . . ."
>
> *Tehan v. Shott, supra* at p. 415.

In contrast to the accused's right to representation by counsel at trial, the privilege against self-incrimination, like the guarantees of the Fourth Amendment, reflects "the concern of our society for the right of each individual to be let alone" and "is not an adjunct to the ascertainment of truth." *Tehan v. Shott, supra* at p. 416.

Moreover, to the extent that the *Garrity* rule seeks to deter police departments or prosecutors from using the threat of forfeiture of employment to coerce a suspected officer into incriminating himself, this purpose would not be advanced by making the rule retroactive. Past coercive practices inflicted upon suspect police officers would not be corrected by reversing their convictions. *See Linkletter v. Walker, supra,* 381 U.S. 618, 637.

The second consideration affecting the determination as to whether a new rule of criminal procedure should be given retroactive application, "the extent of the reliance by law enforcement authorities on the old standards" (*Stovall v. Denno, supra,* 388 U.S. 293, 297), also favors limiting the application of the *Garrity* rule to future cases.

As this Court noted in the companion case to *Garrity, Spevack v. Klein, supra,* 385 U.S. 511, 513, the Court had as recently as 1961 held that the privilege against self-incrimination was not available to an attorney who was the subject of a judicial disciplinary proceeding. *Cohen v. Hurley,* 366 U.S. 117, 125-27. The Court in *Cohen* also held that the Fifth Amendment's privilege against self-incrimination was in any event not applicable to the states by reason of the Fourteenth Amendment, a holding that remained the law until two months after Stafford's disputed appearance before the Grand Jury. *Malloy v. Hogan, supra,* 378 U.S. 1.

In *Tehan v. Shott, supra,* 382 U.S. 406, 417, the Court indicated that reliance by the states on such decisions by this Court was, as it had been in the *Linkletter* decision, "an important factor militating against . . . retroactive application."

Thirdly, "the effect on the administration of justice of a retroactive application of the new standards" (*Stovall v. Denno, supra,* 388 U.S. 293, 297), would perhaps not be widespread but would be severe in view of the difficulty as well as the strong public interest in ferreting out and punishing criminal conduct on the part of law enforcement officers.

As noted in the dissenting opinion of Justice Harlan in *Garrity,* concurred in by Justices Clark and Stewart,

> ". . . . the conduct in question is that of officials directly entrusted with the administration of justice. The importance for our systems of justice of the integrity of local police forces can scarcely be exaggerated. Thus, it need only be recalled that this Court itself has often intervened in state criminal

> prosecutions precisely on the ground that this might encourage high standards of police behavior. See, e.g., Aschcraft v. Tennessee, 322 U.S. 143; Miranda v. Arizona, supra. . . ." (385 U.S. 493, at pp. 507-08.)

Although finality of judgment has sometimes been the standard by which retroactive application has been limited (*see Linkletter v. Walker, supra,* 381 U.S. 618, 639-40), in other cases different standards such as the date of the disputed police practice (*Stovall v. Denno, supra,* 388 U.S. 293, 296, 300), or the date of the commencement of the trial have instead been determinative.

> *DeStefano v. Woods, supra,* 392 U.S. 631, 635;
> *Johnson v. New Jersey, supra,* 384 U.S. 719, 732-33.

> ". . . [T]he retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved. . . ."
>
> *Johnson v. New Jersey, supra* at p. 728.

For these reasons respondent urges that this Court limit the application of the new rule of *Garrity v. New Jersey, supra,* 385 U.S. 493, to those cases in which the alleged coercive choice between job forfeiture and self-incrimination was imposed subsequent to the date of the *Garrity* decision.

B. Petitioner Stafford's Testimony Before the Grand Jury Was Not Given Under Compulsion and Therefore Was Admissible Under the Rule of Garrity v. New Jersey, 385 U.S. 493

Petitioner Stafford testified before the Grand Jury of Los Angeles County on April 22, 1964, approximately one month subsequent to the date of the detention and search in question. (Rep. Tr. pp. 1207-10, 2308.) At the trial, approximately one year later, the prosecution sought to impeach Stafford by cross-examining him as to his testimony before the Grand Jury. This effort to impeach Stafford failed almost entirely, as petitioners stressed at the trial (Rep. Tr. pp. 2343-44, 2362, 2364, 2366, 2377, 2398) and as noted in the opinion of the Court of Appeal. *People v. Canard, supra,* 257 A.C.A. 500, 524 (1967). [65 Cal. Rptr. 15, 31.]

However, petitioners insist that the use of Stafford's testimony before the Grand Jury affords ample reason for the granting of their Petition and reversal of the judgments after hearing in this Court. (Petition, pp. 44-46.) Respondent submits that Stafford's testimony before the Grand Jury was given entirely voluntarily and that the use of this testimony did not infect the subsequent trial with any element of unfairness.

The determination as to whether the *Garrity* rule rendered inadmissible at the trial the prior testimony given by Stafford before the Grand Jury poses two questions: (1) whether the events that preceded Stafford's appearance before that body rendered his testimony the product of coercion, and (2) whether *Garrity* can ever apply to statements by the accused which are *ex*culpatory rather than inculpatory in nature.

(1) The Events Preceding Stafford's Appearance Before the Grand Jury

The following evidence, which was received outside the presence of the jury at petitioners' request (Rep. Tr. pp. 1172, 1176, 1179), is the basis for their claim that the events that preceded Stafford's testimony before the Grand Jury rendered this testimony involuntary and therefore inadmissible at the trial.

At 8:30 a.m. on March 20, 1964, Stafford was driving his son to school in a Valiant which had been provided to him for police business. Several police officers had been instructed by Captain Sidney Mills to place Stafford on assignment to Internal Affairs for the day and to take possession of his notebooks as well as any papers relevant to the investigation. (Rep. Tr. pp. 1177, 1180-81.) When Stafford dropped off his son in Temple City, Sergeant Norman Judd (a lieutenant at the time of trial) exited from his police vehicle, approached Stafford, identified himself, and asked Stafford to step out of the Valiant. Stafford's notebooks were on the seat of the Valiant. Sergeant Judd took possession of the notebooks. (Rep. Tr. pp. 1181, 1184-86, 1207, 1224, 1376, 1383.)

According to Stafford's testimony, he removed the notebooks, two of which were his personal property, from his pockets when ordered to do so by Sergeant Judd.[1] He kept police information inside the two personal notebooks. (Rep. Tr. pp. 1291-92, 1305.) Pursuant to the officers' request, he removed his gun and his badge and was searched without his consent. (Rep.

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[1]The notebooks contained information that was offered against petitioners at the trial. *See People v. Canard, supra,* 257 A.C.A. 500, 515 (1967) [65 Cal. Rptr. 15, 25].

Tr. pp. 1188, 1292-93.) The officers did not have an arrest warrant or search warrant, and Stafford was not advised of his constitutional rights. (Rep. Tr. pp. 1177-78, 1196-97, 1296.)

Stafford was told that he was the subject of an investigation and assigned to Lieutenant Robert Hill for the day. (Rep. Tr. pp. 1182, 1188, 1236.) Lieutenant Hill and Stafford got into Sergeant Judd's vehicle. According to Stafford, he was told to get in the back of the police vehicle and sit on the prisoner's side (the right rear side). Rep. Tr. pp. 1237, 1293.) Stafford was driven to the Sunny Cal Motel located in San Gabriel, a community neighboring Los Angeles. (Rep. Tr. pp. 1181, 1183, 1208, 1295.)

Sergeant Judd, Lieutenant Hill, and two other lieutenants were present in the motel room with petitioner Stafford. Stafford was requested to empty his pockets and to disrobe. When he had undressed except for his shorts, he indicated that he did not care to disrobe further but Lieutenant Hill ordered him to do so. (Rep. Tr. pp. 1197-1200, 1266.) Stafford's account, denied by the officers, was that Lieutenant Hill threatened to "tear" off Stafford's shorts. (Rep. Tr. pp. 1199, 1295.) Stafford was given a skin search, which included an examination of his anal orifice and the area underneath his testicles. (Rep. Tr. pp. 1212-13.) Nothing was discovered during the course of the skin search. (Rep. Tr. p. 1202.)

Stafford was kept in the motel room from shortly after 8:30 a.m. until 1:00 or 1:30 in the afternoon. (Rep. Tr. p. 1213.) During this period he was kept under constant observation, including his visits to the toilet area. He was not allowed to leave, and his re-

quest to telephone his wife was refused. (Rep. Tr. pp. 1245-46, 1248, 1252-53.) The purpose of the detention was to conduct the personnel investigation and secondly to prevent Stafford from communicating with anyone else connected with the investigation. (Rep. Tr. p. 1251.) From the motel Stafford was taken to the Police Administration Building, where he was questioned until 11:00 or 12:00 that night, when he was taken home, his automobile and garage searched, and certain papers taken. According to Stafford, this was done over his protest. (Rep. Tr. pp. 1247-48, 1267-68, 1302-03.)

Lieutenant Hill based his authority over Stafford on the fact that Stafford was "employed as a policeman." (Rep. Tr. p. 1257.) (Officer De Maddalena, a codefendant, was taken to another motel and given a skin search. (Rep. Tr. pp. 1277, 1280.))

Stafford testified that he suffered from a pancreas disorder that required him to eat often and that he was refused permission to eat from about 10:30 a.m. to 1:00 p.m., when he was given a cheese sandwich. He also testified that he refused a request of the officers that he telephone his wife and permit them to record the conversation. Stafford also testified that from 2:00 p.m. to 5:00 or 6:00 p.m. on the day in question, he was placed in a chair in the interrogation room at the police building. He was not questioned during that period and was told to look at a wall and not to turn his head. (Rep. Tr. pp. 1299, 1308.) Thereafter he was questioned without being advised as to his constitutional rights. He was told that his refusal to answer questions "would be insubordination." (Rep. Tr. pp. 1300-02.) Although he was aware "that civilians had that opportunity" not to answer questions, he also

was aware that he "would be put in insubordination if [he] refused to answer any questions." (Rep. Tr. p. 1310.) He felt he would be disciplined or dismissed if he failed to comply with any of the officers' orders. (Rep. Tr. p. 1312.)

When Stafford appeared before the Grand Jury approximately one month subsequent to the aforementioned events, the subject of the Grand Jury's investigation was described to him and he was informed that he was a suspect and could be indicted on one or more felony charges. Stafford stated that he understood this and related, in response to questions, that he had an attorney (one Max Herman) with whom he had spoken prior to appearing before the Grand Jury. His attorney had advised him of all his constitutional rights as a suspect of a crime. (Rep. Tr. pp. 2309-10.)

Stafford testified further before the Grand Jury:

> "'Q Do you know what your legal rights are as an individual that might be suspect of a crime in testifying before a body under oath?
>
> "'A Yes, sir.
>
> "'Q Now, under the circumstances of the law of our State, Mr. Stafford, you can't be a witness before the Grand Jury, a Grand Jury that is inquiring into a possible criminal indictment against you, unless you volunteer to do that. Do you understand that?
>
> "'A Yes, sir.
>
> "'Q Now, are you here because you want to be here?
>
> "'A Yes, sir.

"'Q And is it your desire to ask the permission of this Grand Jury to testify before it?

"'A Yes, sir.

"'Q You want to testify?

"'A Yes, sir.

"'Q Nobody is forcing you to do this?

"'A No, sir.

"'Q This is a free and voluntary act on your part, is that right?

"'A Yes, sir.

"'Q Nobody has promised you that if you testify here that you would get a lesser sentence if you were convicted or probation or be permitted to plead guilty to any lesser offense, have they?

"'A No, sir.

"'Q Now, if you, as you have indicated, decide that you want to answer questions and testify before this body, you understand you also have the right to refuse to answer any question the answer to which might tend to incriminate you even though you want to testify? You don't have to answer it unless you want to. Do you understand that?

"'A Yes.

"'Q And you can stand on the constitutional provisions of the United States and of our state and that you don't have to answer a question that might incriminate you. You just tell us that.

"'A I understand that, yes.

"'Q And if any question is put to you by any person here and you want to have some time to talk to your lawyer, you understand you can go talk to your lawyer?

"'A Yes, sir.

"'Q And consult with him first. We will give you every opportunity. Do you understand?

"'A Yes, sir.

"'Q And if at any time, why, you want to interrupt the proceedings to counsel with your attorney, we'll let you do that, too. Do you understand that?

"'A Yes, sir.

"'Q And under these circumstances, do you now request this Grand Jury to give you the permission to testify regarding the matters that are pending before it?

"'A Yes, sir.

"'Q Incidentally, anything that you do testify to here, if you should be indicted, you understand it could be used against you in any other proceedings?

"'A Yes, sir. My lawyer explained all this to me.'" (Rep. Tr. pp. 2310-13.)

Stafford testified at the trial that the foregoing questions and answers accurately reflect his testimony before the Grand Jury. (Rep. Tr. p. 2313.) The Grand Jury proceedings were secret, and Stafford was not permitted to have his attorney present. Stafford testified that even after receiving the above quoted admonitions from the prosecuting attorney at the outset of the Grand Jury proceedings, he still "knew that if I refused to testify, I'd be fired." (Rep. Tr. pp. 2313-14.)

Stafford testified that during the month between his detention and his appearance before the Grand Jury, he was told by Captain Mills, "'You know that you are police officers and cannot take the Fifth Amendment. If you do take the Fifth Amendment, you'll be

fired. You understand that, don't you?'" (Rep. Tr. pp. 2305-06.) According to Stafford, on another occasion while being interrogated, the same thing in essence was told to him. (Rep. Tr. pp. 2306-07.) This testimony was essentially uncontradicted and was consistent with Los Angeles Police Department Rules. (Rep. Tr. pp. 971-72.)

Stafford testified that he went before the Grand Jury because he did not want to lose his job. He had a police hearing pending and at that time no charges had been brought against him. He had been on the police force almost seventeen years and did not want to lose his lifetime pension of $400 a month. (Rep. Tr. p. 2307.)

At the trial defense counsel raised in substance the objection raised in *Garrity,* that Stafford's testimony before the Grand Jury was given under compulsion and was therefore inadmissible—in the present case as impeachment. (Rep. Tr. pp. 2298-2301.)

Following the hearing outside the presence of the jury at which the evidence set forth above was received, the trial court made lengthy findings that in view of the legal warnings given Stafford at the outset of his testimony before the Grand Jury and Stafford's responses thereto, his testimony before that body was freely and voluntarily given. (Rep. Tr. pp. 2315-17.)

Part of the trial court's ruling was as follows:

> ". . . [H]e was not under a compulsion whatsoever, in view of the complete statement that was made to him, and his answers in response to those statements.

"It might also be suggested by the Court that if the Court were to adopt the objection raised by Mr. Parsons, then a person could under similar conditions with complete impunity testify to almost anything before the Grand Jury, and then rely on his Constitutional rights and not be fearful of any consequences, since he would feel that he had been safe in testifying to any matters before the Grand Jury because it couldn't be used against him in any subsequent proceeding." (Rep. Tr. pp. 2316-17.)

In evaluating the propriety of the actions which transpired in the motel room and the Police Administration Building on March 20, 1964, it is important to remember that petitioner Stafford was a police officer and not an ordinary civilian. Lieutenant Hill specifically based his authority over Stafford on this fact. (Rep. Tr. p. 1257.) This is particularly relevant to petitioners' complaint that the motel to which Stafford was taken was outside the city limits of Los Angeles. (Petition, p. 16.)

As a police officer Stafford was under a duty to obey all but the most blatantly unreasonable commands.

Under the present circumstances the orders of the officers assigned to Internal Affairs were severe but not unreasonable in the sense of being arbitrary or capricious. Sergeant Stafford was the supervising bookmaking sergeant in Central Division vice and was perhaps the oustanding bookmaking investigator in California. (Rep. Tr. pp. 86-87, 116.) Upon learning that a person in Stafford's position was in the employ of criminal elements in Los Angeles, the police had to take severe measures.

As this Court had recent occasion to note, a police officer

> ". . . is directly, immediately, and entirely responsible to the city or State which is his employer. He owes his entire loyalty to it. He has no other 'client' or principal. He is a trustee of the public interest, bearing the burden of great and total responsibility to his public employer. Unlike the lawyer who is directly responsible to his client, the policeman is either responsible to the State or to no one. . . ."
>
> *Gardner v. Broderick,* 392 U.S. 273, 277-78.

The Los Angeles Police Department properly felt that Stafford's detention and interrogation, and the search of his person and effects, was necessary to the accomplishment of the personnel investigation of the suspect officers. Undoubtedly the investigating officers hoped to discover additional documentary evidence of Stafford's guilt such as that found in his notebooks. Secondly, it was felt essential to keep Stafford incommunicado so that he would not forewarn the other conspirators that the bookmaking-bribery ring had been uncovered. (Rep. Tr. p. 1251.) Seventy-five officers were in the field awaiting the order to arrest suspects at bookmaking locations. In the end the investigation undertaken that day revealed evidence of bookmaking at ten locations of which both Stafford and De Maddalena had the telephone numbers in their notebooks. *People v. Canard, supra,* 257 A.C.A. 500, 510 (1967) [65 Cal. Rptr. 15, 22].

Stafford and De Maddalena were taken at first to motel rooms rather than to the police building for the

apparent reason that the police felt there might be other officers involved in the conspiracy who would be forewarned, thus jeopardizing the mass investigation, if they were to see Stafford and De Maddalena being brought to the station in detention.

In any event, in evaluating petitioners' claim of error it is essential not to lose sight of the primary consideration, *viz.*, whether the unpleasantness to which Stafford was subjected, properly or not, rendered his testimony before the Grand Jury one month later the product of coercion.

Respondent submits that assuming, but not conceding, that petitioner Stafford was subjected to an improper investigation on March 20th, this fact as well as any intimation that he would be disciplined or dismissed in the event he refused to testify before the Grand Jury did not render his testimony before that body involuntary and therefore inadmissible at the trial under *Garrity v. New Jersey,* 385 U.S. 493.

The test, as expressed by this Court, is

> ". . . '[W]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' . . ."
>
> *Wong Sun v. United States,* 371 U.S. 471, 488;
> *See also, Hoffa v. United States,* 385 U.S. 293, 308-09;
> *Nardone v. United States,* 308 U.S. 338, 341;
> *Smith v. United States,* 324 F.2d 879, 881-82 (D.C. Cir. 1963), *cert. denied,* 377 U.S. 954;

Payne v. United States, 294 F.2d 723, 726-27 (D.C. Cir. 1961), *cert. denied,* 368 U.S. 883; *People v. Ditson,* 57 Cal. 2d 415, 443-44 (1962) [20 Cal. Rptr. 165, 181].

From the opinion of this Court in *Garrity,* that case appears to have involved uncontradicted evidence that the prior testimony was given under duress.

The contrast between the defendants' pre-trial interrogation in *Garrity* and petitioner Stafford's appearance before the Grand Jury is striking.

In *Garrity* the questioning of each defendant began with an explanation of his legal rights and the warning that, in accordance with a New Jersey statute, "if he refused to answer he would be subject to removal from office." *Garrity v. New Jersey, supra* at p. 494.

In the present case while there is evidence that fellow officers had intimated in the weeks preceding the Grand Jury hearing that Stafford would be subject to discipline in the event he refused to testify, the Grand Jury proceeding was apparently free from any such coercive suggestions.

As set forth above, at the outset of the hearing Stafford was given a painstakingly detailed account of his legal rights by the prosecuting attorney. Stafford testified that before his appearance he had conferred with his attorney, who had also explained Stafford's constitutional rights. Stafford testified further that he understood his rights, including the fact that he could testify before the Grand Jury only if he volunteered to do so. Stafford's testimony indicated expressly that he had appeared because he freely and voluntarily desired to do so and that no one had forced him to do

so. He understood that he could claim his privilege against self-incrimination as to any question that might incriminate him. Stafford was also told that he could interrupt the proceedings at any time to consult with his attorney before answering any question. (Rep. Tr. pp. 2309, 2313.)

At the time Stafford chose to testify before the Grand Jury, weeks had elapsed since the motel room detention and the intimations that he might be fired in the event he refused to testify. These events were superseded by the explanation of his legal rights received by Stafford at the outset of the Grand Jury hearing and his testimony at that hearing expressly indicating his uncoerced decision to testify.

In light of the present record it appears that Stafford's appearance before the Grand Jury was precisely "the situation where one who is anxious to make a clean breast of the whole affair volunteers the information." *Garrity v. New Jersey, supra* at p. 499.

(2) The Applicability of Garrity v. New Jersey, 385 U.S. 493, to Statements That Were Neither Confessions Nor Admissions But Merely Exculpatory Statements Used to Impeach the Credibility of Petitioner Stafford as a Witness

Garrity v. New Jersey, supra, 385 U.S. 493, speaks in terms of using "the threat of discharge to secure *incriminatory evidence* against an employee." (Emphasis added.) *Supra,* at p. 499.

The disputed testimony of Stafford before the Grand Jury was all exculpatory and was used at the trial only to impeach Stafford's credibility as a witness after Stafford had taken the stand and made a general de-

nial of any involvement in the conspiracy charged. *People v. Canard, supra,* 257 A.C.A. 500, 515-16 (1967) [65 Cal. Rptr. 15, 25].

At the trial, Stafford testified that he found a mug book (Exh. V or W; belonging to one Officer Dohler) while cleaning out his file cabinet. It had a note attached that said, "Possibly came out of NZK 002, a 1962 blue Ford." The Department of Motor Vehicles did not have the car listed. Stafford had lost a book a few days earlier. When he called down to the garage he mistakenly referred to NZK 002, which he had on his mind. (Rep. Tr. pp. 2255-58.)

At the time Stafford testified before the Grand Jury, he did not recall that the presence of NZK 002 in his book had been the result of an inquiry about Exhibits V and W. (Rep. Tr. p. 2274.)

The Grand Jury proceeding took place about one year before the trial. Stafford had had a chance to refresh his recollection. The use of the Grand Jury testimony merely tested his memory and veracity as a witness.

At the trial, Stafford testified that Myers reputedly knew a lot of gamblers. (Rep. Tr. p. 2203.)

Before the Grand Jury, Stafford testified that Myers was reputed to be the money behind gambling and that it had been known that he did some bookmaking. (Rep. Tr. p. 2343.) Petitioners contended at the trial that this was no impeachment at all. (Rep. Tr. p. 2343, lines 16-19; p. 2344, lines 5-7.)

Before the Grand Jury, Stafford also testified that he had information that Al Glassman was running a back sports office for Myers. (Rep. Tr. p. 2399.) Pe-

titioners contended at the trial that this was not impeaching. (Rep. Tr. p. 2377, lines 1-3; p. 2398, lines 5-6.)

At the trial, Stafford merely elaborated in greater detail on Myers' reputation.

Before the Grand Jury, Stafford testified that he did not recall the meaning of the entry in his notebook "Make meet with Cy, Maury, Hank." The only thing he could think of was,

> " 'Well, when we went to the Westward Ho restaurant I discussed with him the week prior about that I knew that Myers sometimes ate there, and I also knew—I told him, like I told you before, that he is, you know, reputed to be one of the big backers of bookmaking, and he was in the district.' " (Rep. Tr. p. 2363.)

He did not remember which Maury he was talking about. (Rep. Tr. pp. 2362-65.) Petitioners contended at the trial that this did not constitute impeachment. (Rep. Tr. p. 2362, lines 15-17; p. 2364, lines 4-6; p. 2366, lines 23-25.)

At the trial, Stafford testified that "Make meet with Cy, Maury, Hank" referred to Gordon Jones (it was a "J", not a "Y"), Hank Weldon, and Maury Rissman. (Rep. Tr. p. 2361.)

Before the Grand Jury, Stafford had claimed not to remember the significance of the entry and related the only thing he could think of. At the trial, his memory of the significance of the entry was somewhat better.

Respondent submits that by its language the *Garrity* opinion is limited to the exclusion of incriminating evidence and was never intended to enable a defendant to take the witness stand, issue a general denial of the alleged offense, testify that his prior statements were the result of coercion, and thereby insulate himself from impeachment on cross-examination.

See People v. Genser, 250 Cal. App. 2d 351, 354-55 (1967) [58 Cal. Rptr. 290, 291], which discusses the *Garrity* opinion.

As Justice Frankfurter wrote for the Court in *Walder v. United States,* 347 U.S. 62,

"It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession wa. obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. . . .

". . . [T]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility. . . ."

Walder v. United States, supra at p. 65;

See also Brown v. United States, 356 U.S. 148, 155-56.

C. Assuming But Not Conceding Error in the Use at Trial of Petitioner Stafford's Prior Testimony Before the Grand Jury, Such Error Was Harmless Beyond a Reasonable Doubt Under Chapman v. California, 386 U.S. 18, Particularly With Regard to the Other Petitioners

In the recent case of *Chapman v. California,* 386 U.S. 18, this Court recognized that not all error of a constitutional magnitude requires reversal of the judgment convicting an accused.

The test set forth in *Chapman* is that "the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Supra,* at p. 24. *See also Fahy v. Connecticut,* 375 U.S. 85, 86-87.

This was precisely the test applied by the California Court of Appeal in evaluating the contention of petitioners that they were entitled to reversal of their convictions under the *Garrity* decision:

> ". . . [A]ssuming that error was committed, it was not prejudicial. Beyond a reasonable doubt, the error in permitting the use of the grand jury testimony could not have prejudiced Stafford. (Chapman v. California (1967) 386 U.S. 18, 24. . . .)"
>
> *People v. Canard,* 257 A.C.A. 500, 525 (1967) [65 Cal. Rptr. 15, 31].

Respondent submits that from an examination of the disputed Grand Jury testimony, set forth above in the preceding subargument, it is clear beyond a reasonable doubt that petitioner Stafford could not have been prejudiced by the minimal and almost totally ineffective impeachment effected by use of his prior testimony before the Grand Jury.

It is true, *a fortiori,* that the other petitioners could not have been prejudiced by the use of this prior testimony to impeach Stafford. This conclusion is fortified by the trial court's instructions to the jury which limited the impeachment to Stafford's credibility as a witness. The instructions also served to minimize any prejudice to Stafford himself. (Cl. Tr. pp. 84, 88-89, 91-92; *see also* Rep. Tr. pp. 2323-24.)

II

THE DETENTION AND SEARCH OF PETITIONER STAFFORD WERE NOT VIOLATIVE OF THE FOURTH AND FOURTEENTH AMENDMENTS' PROSCRIPTION AGAINST UNREASONABLE SEARCHES AND SEIZURES

Petitioners contend that petitioner Stafford was denied the right to a fair trial and due process of law, in violation of the Fourth and Fourteenth Amendments to the United States Constitution, by reason of his detention, the allegedly unlawful search, and the use of the fruits thereof at the trial. (Petition, p. 28.)

Petitioners' argument is largely a recasting, in terms of search and seizure, of the contention discussed in the previous argument herein. Respondent therefore incorporates the previous argument insofar as it relates to Stafford's rights under the Fourteenth Amendment as defined by the Fourth Amendment.

Petitioners' claim of unreasonable search and seizure must confine itself at this stage of the proceedings to the assertion that certain evidence, physical or testimonial, was received in evidence at the trial (*Mapp v. Ohio,* 367 U.S. 643, 655) as the result of the search and seizure of their persons, or of the search of proper-

ty and the seizure of evidence in which they had an interest.

Simmons v. United States, 390 U.S. 377, 389-90;

Jones v. United States, 362 U.S. 257, 261.

These principles apply to limit petitioners' claim of unreasonable search and seizure as follows. First, the argument in question can be made in this forum only by petitioner Stafford since he alone among the petitioners can be alleged to have been "the victim of an invasion of privacy." *Jones v. United States, supra* at p. 261. The other petitioners had no interest in any premises searched or property seized. Secondly, the only items of evidence which belonged to Stafford and whose *reception at the trial* are contested by petitioners on the ground of unlawful search and seizure are the two notebooks (Exhibits 69 and 70) which were taken from the seat of the police Valiant when Stafford was stopped at the school on March 20th.

Petitioner Stafford's detention at the motel and later in the day at the police building is not alleged to have resulted in the reception of any evidence at the trial, with the exception of the testimony given by Stafford before the Grand Jury, a matter discussed in the preceding argument. Assuming, but not conceding, that Stafford's detention by his fellow police officers constituted an unlawful arrest, this fact alone would have no bearing on the validity of his conviction. This Court has held that even the unlawful and forceful abduction of an accused by law enforcement officers does not in itself impair the validity of the proceedings at his trial. *Frisbie v. Collins,* 342 U.S. 519, 522-23.

Turning to the seizure of the two notebooks, respondent submits that the detention of Stafford at the school was proper and that the evidence retrieved incidentally thereto was properly received at the trial over objection. (Cl. Tr. pp. 32-34; Rep. Tr. pp. 1177-78.)

Depite petitioners' implication to the contrary, neither federal nor California law required the investigating officers to obtain an arrest warrant or search warrant to detain Stafford and search his person. (Rep. Tr. p. 1177.)

United States v. Rabinowitz, 339 U.S. 56, 65-66;

People v. Winston, 46 Cal. 2d 151, 162-63 (1956) [293 P. 2d 40, 47].

When Stafford dropped off his son at school, Sergeant Judd approached Stafford, identified himself, and asked him to step out of the Valiant (a police-owned vehicle). There is ample evidence in the record indicating that the notebooks were in plain sight on the seat of the Valiant. Sergeant Judd took possession of the notebooks after Stafford left the vehicle. (Rep. Tr. pp. 1124, 1180-81, 1184-86, 1207, 1224, 1376, 1383.)

This evidence was contradicted by the testimony of Stafford, who claimed to have removed the notebooks from his pockets when ordered to do so by Sergeant Judd. Stafford claimed further that he had purchased the two notebooks with his own money, although he admitted that he kept information concerning official police business inside these notebooks. (Rep. Tr. pp. 1291-92, 1305, 2157.) The notebooks contained information that was offered against petitioners at the trial.

See People v. Canard, supra, 257 A.C.A. 500, 515 (1967) [65 Cal. Rptr. 15, 25.].

To avoid undue repetition, respondent refers to its previous argument regarding the right of the Internal Affairs officers to conduct a personnel investigation of the department's police officers. In light of these special circumstances it is submitted that the ordinary rules of arrest and search and seizure do not apply.

Moreover, it is significant that the vehicle Stafford was driving belonged to the police department and not to him. The notebooks were records of official police business. That Stafford may have purchased the notebooks with his own funds does not seem significant; certainly a police officer cannot insulate records of official police business from inspection by the police department merely by entering them in a notebook which he has paid a few cents to purchase.

Davis v. United States, 328 U.S. 582, 588-91;
Wilson v. United States, 221 U.S. 361, 380;
United States v. Collins, 349 F.2d 863, 867-68 (2d Cir. 1965), *cert. denied,* 383 U.S. 960.

But even in the event the detention of Sergeant Stafford and the seizure of the notebooks were to be judged by the standards applicable to confrontations between the ordinary citizen and the police, the detention and seizure here would pass muster under the Fourth and Fourteenth Amendments.

The information in the possession of the investigating officers was not only enough to justify them in detaining Stafford on the street and subjecting him to a cursory search (*see Terry v. Ohio,* 392 U.S. 1) but was sufficient to afford them probable cause for

his arrest and justify a search incidental thereto. *United States v. Rabinowitz, supra* at pp. 60-61.

See People v. Canard, supra, 257 A.C.A. 500, 505-10, 518 (1967) [65 Cal. Rptr. 15, 18-22, 27].

However, as previously noted there is substantial evidence in the record which indicates that the notebooks were already in plain sight on the seat of the Valiant at the time Stafford was approached by the investigating officers, and therefore no search took place.

People v. Harris, 67 Cal. 2d 866, 871 (1967) [64 Cal. Rptr. 313, 317], and cases cited therein.

See also United States v. Lee, 274 U.S. 559, 563.

The notebooks were subject to seizure whether they are viewed as instrumentalities of the offense or as mere evidence of the offense.

Warden v. Hayden, 387 U.S. 294, 300;

People v. Thayer, 63 Cal. 2d 635, 642 (1965) [47 Cal. Rptr. 780, 784], *cert. denied,* 384 U.S. 908.

See People v. Canard, supra, 257 A.C.A. 500, 518 (1967) [65 Cal. Rptr. 15, 27].

Finally, even if the admission in evidence of the notebooks is deemed erroneous, it is clear beyond a reasonable doubt that petitioners were not prejudiced thereby. *Chapman v. California,* 386 U.S. 18, 24.

III

THE TRIAL COURT PROPERLY REFUSED TO DECLARE A MISTRIAL SOUGHT ON THE BASIS OF UNFAVORABLE NEWSPAPER AND TELEVISION PUBLICITY DURING THE PENDENCY OF THE TRIAL

Petitioners contend that the trial court erred in denying their motion for mistrial founded upon unfavorable newspaper and television publicity during the pendency of the trial. (Petition, p. 31.)

That part of the record bearing upon petitioners' present contention is fully and accurately set forth in the opinion of the Court of Appeal. The relevant portion of the opinion is set forth verbatim below with citations to the record supplied in brackets by respondent.

> "During the progress of the trial, defendants moved for a mistrial on the ground that unfavorable publicity in the local press and on television news prejudiced their chances for a fair trial. The court denied defense requests to poll the jury to determine whether they had read or heard the news reports, and denied their motions for a mistrial. Defendants assign this as error. [Rep. Tr. pp. 359-60, 900-09, 996-1011, 2098-2104.]
>
> "The publicity referred to consisted mostly of substantially accurate reporting by the news media during the trial of the evidence as it was presented. [Rep. Tr. pp. 903, 1003-04; Exhibits D, K, T, and U.] There were two notable exceptions: On April 20, 1965, the prosecution's star witness, Officer Gunn, testified that in a conversation with De Maddalena which concerned the latter's plan to

take over the operation when Stafford left Central Vice, he had asked De Maddalena if he was afraid of Stafford. De Maddalena had indicated he thought he could handle Stafford, although he was known as a 'mean guy' who had 'access to muscle' and who had set up several individuals in the past for a 'working over'; that one of these individuals, a bookmaker named Lipowitz, had been set up by Stafford 'for a working over with a baseball bat.' This testimony was elicited without objection. After it had been received, a motion to strike was denied. However, later in the trial—on May 3, 1965—the court granted defense motions to strike it. [Rep. Tr. pp. 343, 357, 359-60, 2030, 2097.]

"On April 23rd the Los Angeles Herald-Examiner printed a story concerning the statement that Stafford had Lipowitz beaten up with a baseball bat. In the story, details of that beating and another one Lipowitz allegedly received were reported. The details were never brought out at the trial. [Exhibit L.]

"On the 5 p.m. and 11 p.m. KABC-TV Baxter Ward news programs of the same date, Mrs. Lipowitz was interviewed. She was questioned concerning her husband's having been 'worked over.' She stated that she had gone to the trial to see Stafford, because she 'wanted to see what a man looked like, an officer of the law, that could do such a thing as that.' She further stated that putting Stafford in prison for the rest of his life could not adequately punish him for what he had done to her husband; that the testimony of his fellow officers indicated Stafford had had her husband beaten up. [Exhibits R and S.]

"Throughout the trial the court repeatedly, and in clear and unequivocal language, admonished the jurors that they were not to form any opinion on the case until it was submitted to them; that they were not to read any reports of the case in the newspapers, or to listen to or watch any reports of it on radio or TV. In its formal instructions, the court told the jurors that in deciding the case they were to be governed solely by the evidence introduced at the trial and the law as stated by the court. [Cl. Tr. p. 72; Rep. Tr. pp. 53A-54A, 58, 89, 133, 173, 387, 669, 706, 844, 889, 978, 1005, 1032, 1061, 1067, 1155, 1175-76, 1360, 1409, 1625, 1707, 1770, 1856, 1931, 1960, 1975, 2158, 2247, 2293, 2374, 2467, 2537, 2596, 2642, 2738, 2805, 2989, 3055.]

"The trial judge, in denying the motions for mistrial and to poll the jury concerning the news reports, concluded that the publicity was not conceivably prejudicial; that he was satisfied with the integrity and intelligence of the jurors and had to assume they abided by his repeated admonitions; that he would not have the jury polled because he neither wished to arouse their curiosity nor to embarrass them." [Rep. Tr. pp. 907-08, 1010-11, 2104.] *People v. Canard, supra,* 257 A.C.A. 500, 518-19 (1967) [65 Cal. Rptr. 15, 27-28].

Respondent submits that the evidence of the Lipowitz beating was relevant and admissible in that it tended to prove that Stafford was part of the conspiracy. However, the trial court in an effort to be particularly fair struck the disputed testimony relating to the beat-

ing (Rep. Tr. p. 2097), and this certainly obviated any prejudice to Stafford and the other petitioners.

There was nothing in the record establishing that the jurors were aware of, or had been influenced by, the newspaper and television publicity, most of which was a totally accurate reflection of the evidence received in the courtroom and none of which was prejudicial. Under California law the jury was assumed to have heeded the trial court's repeated admonitions not to look at news reports of the case (*People v. Gomez,* 41 Cal. 2d 150, 161-62 (1953) [258 P.2d 825, 832], and in view of these admonitions it was proper for the trial court to refuse to poll the jury.

People v. Lambright, 61 Cal. 2d 482, 486-87 (1964) [393 P.2d 409, 412], *appeal dismissed and cert. denied,* 384 U.S. 434;

People v. Brac, 73 Cal. App. 2d 629, 635-36 (1946) [167 P.2d 535, 538].

None of the publicity is claimed to have occurred prior to the trial, and accordingly no claim is made that any juror came to the case convinced of petitioners' guilt. *Cf. Irvin v. Doud,* 366 U.S. 717, 727.

Petitioners have failed to meet the burden of demonstrating that the press aroused such prejudice against them that they were necessarily precluded from receiving a fair trial.

Stroble v. California, 343 U.S. 181, 191-95;

Cf. Sheppard v. Maxwell, 384 U.S. 333, 354, 356-58, relied on by petitioners.

As the Court of Appeal correctly concluded with reference to petitioners' claim of error:

"Absolutely no evidence was presented that any pretrial publicity could have affected the selection

> of an impartial jury. This case bears no resemblance to Sheppard v. Maxwell, 384 U.S. 333 . . ., relied on by defendants, where, during the six or seven months preceding the trial, there was 'a barrage' of newspaper headlines, articles and other news reporting, slanted against defendant and creating a 'wave of public passion' against him." *People v. Canard, supra,* 257 A.C.A. 500, 519-20 (1967) [65 Cal. Rptr. 15, 28].

Respondent submits that the newspaper and television publicity during the pendency of the proceedings in no way detracted from the fairness of petitioners' trial.

IV

THE INTERCEPTION AND RECORDING OF TELEPHONE CONVERSATIONS MADE BY PETITIONER STAFFORD AND A CODEFENDANT DID NOT VIOLATE THEIR CONSTITUTIONAL RIGHTS OR THE FEDERAL COMMUNICATIONS ACT

Petitioners contend that the interception of telephone conversations made by petitioner Stafford and by a codefendant, Officer De Maddalena, over police department telephones, and the admission in evidence of recordings of these conversations, were violative of their rights under the Fourth, Fifth, and Sixth Amendments to the United States Constitution and under the Federal Communications Act. (Petition, p. 36.)

The disputed telephone conversations include several conversations between Officer Gunn and De Maddalena, between Officer Gunn and petitioner Myers, and between Officer Gunn and codefendant Adler. (Rep. Tr. pp. 266-72, 302-13, 328-32; Exhibits 4, 9,

11, and 16-18; *People v. Canard, supra,* 257 A.C.A. 500, 511-14 (1967) [65 Cal. Rptr. 15, 22-24].) However, petitioners' claim of error is directed principally to the interception and recording of petitioner Stafford's telephone conversations with Officer Gunn, the Department of Motor Vehicles, and the police vehicle dispatcher's office. (Rep. Tr. pp. 292-94, 1150-51, 1153-55; Exhibits 7, 56 and 57; *People v. Canard, supra* at pp. 507-08, 509-10 [65 Cal. Rptr. at pp. 20, 21-22.])

The aforementioned evidence was received over petitioners' objection at the trial. (Rep. Tr. pp. 1081-86, 1111.)

Los Angeles Chief of Police William Parker testified that the telephones utilized by the police department, which is a branch of the municipal government of the City of Los Angeles, were maintained exclusively for the conduct of police business. (Rep. Tr. pp. 53-54, 69, 955.) Petitioner Stafford was aware of this fact. (Rep. Tr. p. 2234.) When Chief Parker learned that Central Vice telephones were apparently being used for criminal purposes, he ordered Captain Mills of the Internal Affairs Division to monitor and record conversations of the Central Vice telephones. (Rep. Tr. pp. 51, 55-56, 953-54.) Captain Mills therefore ordered one Officer Briggs to establish extensions to Internal Affairs on the Central Vice telephones. (Rep. Tr. pp. 953-54, 956, 1060-61, 1063.) Between 150 and 200 telephone calls were monitored, without the permission of petitioner Stafford or the other parties to the conversations (with the exception of Officer Gunn.) (Rep. Tr. pp. 1069-71, 1080.)

Respondent submits that the monitoring of the conversations and the reception in evidence of recordings

of the conversations were proper under the Constitution as well as under federal and state statutes.

Although the Federal Communications Act (47 U.S.C. § 605) has been applied to interstate communications (*Weiss v. United States*, 308 U.S. 321, 329), it provides a rule of evidence for federal courts and does not apply to state proceedings.

Schwartz v. Texas, 344 U.S. 199, 203;

People v. Sica, 112 Cal. App. 2d 574, 585-86 (1962) [247 P.2d 72], *cert. denied*, 346 U.S. 831.

Moreover, Chief Parker's order arguably rendered the monitoring and recording an "authorized" interception within the meaning of section 605.

California Penal Code sections 640, 653, and 653j likewise permitted the "authorized" interception of the conversations in question, particularly in light of the fact that only "confidential" communications are within the purview of the statutes forbidding eavesdropping or recording. "Confidential" communications are defined as those "carried on in such circumstances as may reasonably indicate that the parties to such communication desire it to be confined to such parties." Expressly excluded from this definition are communications made under circumstances "in which the parties to the communication may reasonably expect that the communications may be overheard or recorded." Cal. Pen. Code § 653j.

As was held by the Court of Appeal in the present case,

> ". . . Clearly the chief of police, as the person supervising and controlling the use of the phones, was a person authorized to monitor them. Any call

> properly made on those telephones was the business of the chief of police, and hence not confidential as to him or those authorized by him to hear it. It is common knowledge that special security precautions must be taken in police departments; those using the lines could reasonably expect that it could take the form of monitoring calls."
>
> *People v. Canard, supra,* 257 A.C.A. 500, 521 (1967) [65 Cal. Rptr. 15, 29].

In a recent decision this Court made it clear that although the absence of any trespass is no longer sufficient in itself to justify the interception of a telephone communication, it is the degree to which privacy could justifiably be expected that renders the communication immune from interception. *Katz v. United States,* 389 U.S. 347, 350-53.

Although *Katz* and other recent decisions of this Court have stressed the preference that interception be pursuant to court order, respondent submits the fact that the lines were city telephones used only for police business rendered the present interception outside the ambit of the constitutional restrictions imposed upon ordinary interception.

This Court has in the past recognized that such restrictions will vary to the degree that the interception takes place where privacy can reasonably be anticipated.

In *Lanza v. New York,* 370 U.S. 139, the Court upheld surreptitious electronic eavesdropping of a conversation between a prisoner and his wife in the visitors' room of a public jail, although the opinion was premised in part upon the fact that no evidence obtained by the electronic eavesdropping was introduced

against the petitioner in a criminal prosecution. *Supra* at pp. 145-47.

The Court noted:

> "But to say that a public jail is the equivalent of a man's 'house' or that it is a place where he can claim constitutional immunity from search or seizure of his person, his papers, or his effects, is at best a novel argument. . . . [W]ithout attempting either to define or to predict the ultimate scope of Fourth Amendment protection, it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day. Though it may be assumed that even in a jail, or perhaps especially there, the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection, there is no claimed violation of any such special relationship here." (Footnotes omitted.) *Lanza v. New York, supra,* at pp. 143-44.

The *Lanza* opinion evidences the reluctance of the courts to extend into high security areas the constitutional safeguards which traditionally have been confined to places where the individual can reasonably expect that his words will not be overheard or recorded.

See People v. Apodaca, 252 Cal. App. 2d 656, 659 (1967) [60 Cal. Rptr. 782, 784];

People v. Hughes, 203 Cal. App. 2d 598, 601 (1962) [21 Cal. Rptr. 668, 670];

People v. Morgan, 197 Cal. App. 2d 90, 93-94 (1961) [16 Cal. Rptr. 838, 840], *cert. denied,* 370 U.S. 965.

In *Sanitation Men v. Sanitation Comm'r,* 392 U.S. 280, 281, 285 (n.6), a case involving the propriety of a dismissal of public employees, this Court did not reach the wiretap issue. The Court of Appeals had upheld the wiretapping, under court order, of a telephone leased by the New York City Department of Sanitation for the transaction of official city business. (383 F.2d 364, 369 (2d Cir. 1967).)

In the present case respondent, in urging the propriety of the wiretapping in question, relies not only on the fact that city telephones used only for official business were involved, but also on the fact of the security precautions which had to be taken and which reasonably should have been anticipated by Stafford and De Maddalena.

Moreover, respondent submits that the recording and use at trial of those telephone conversations which were between Officer Gunn and the defendants (including petitioners Stafford and Myers) were not unlawful even absent the fact of security requirements and of official city telephones being involved. Since Officer Gunn was one of the participants in the conversations and could have testified as to the content of the conversations, he could consent to their interception and recording.

> *Lopez v. United States,* 373 U.S. 427, 438-39;
> *People v. Fontaine,* 237 Cal. App. 2d 320, 331-32 [46 Cal. Rptr. 855, 864], *vacated on another ground,* 386 U.S. 263.

This is particularly true of the recording, by means of an electronic device worn by Officer Gunn, of a conversation between Gunn and De Maddalena. (Peti-

tion, p. 37; Exhibit 14.) *See Lopez v. United States, supra* at pp. 438-39.

Finally, in view of the fact that the interceptions and recordings were made at a time when the crime of conspiracy was still being committed by the defendants and their liberty had not yet been restricted, their claim of denial of right to counsel is without merit.

Massiah v. United States, 377 U.S. 201, 204-06;

People v. Ing, 65 Cal. 2d 603, 612-13 (1967) [422 P.2d 590, 595-96].

V

PETITIONERS' CONTENTION DISPUTING THE SUFFICIENCY OF THE EVIDENCE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

Petitioners contend that "[t]he evidence was insufficient to sustain the judgment of guilty . . . as to any of the petitioners." Petitioners claim specifically "that no conspiracy was established." (Petition, p. 40.)

However, absent a total lack of evidence constituting a denial of due process of law, the sufficiency of evidence establishing guilt is a matter of state law and may not be raised in seeking federal review of a state conviction.

Fernandez v. Klinger, 346 F. 2d 210, 211 (9th Cir. 1965), *cert. denied,* 382 U.S. 895;

Schlette v. People of State of California, 284 F.2d 827, 834 (9th Cir. 1965), *cert. denied,* 366 U.S. 940.

In any event the evidence as disclosed by respondent's Statement of Facts herein was clearly sufficient to sustain the judgments of conviction for conspiracy to obstruct justice, commit bribery, and engage in bookmaking on the part of each of the petitioners.

As was correctly held by the Court of Appeal in the present case:

> "The evidence above summarized is amply sufficient to support the finding of the existence of the conspiracy charged. A conspiracy may be established by circumstantial evidence. (People v. Steccone, 36 Cal.2d 234, 237-238 [223 P.2d 17]; People v. Salani, 218 Cal.App.2d 835, 839 [32 Cal.Rptr. 592].) It is not necessary for the People to show that the defendants actually met and agreed together to perform the unlawful acts. (People v. Steccone, supra, p. 238.) From their acts and conduct in mutually carrying out the common illegal purpose, the existence of the conspiracy may be inferred. (People v. Danielson, 203 Cal.App.2d 498, 505 [21 Cal.Rptr. 469].) The circumstances here clearly indicate the existence of and the carrying out of a scheme to give protection to certain bookmakers through the bribery of police officers. The involvement of each appealing defendant in the conspiracy was plainly shown." *People v. Canard, supra,* 257 A.C.A. 500, 516-17 (1967) [65 Cal. Rptr. 15, 25].

VI

THE TRIAL COURT DID NOT ERR IN EXCLUDING EVIDENCE AS TO THE DISPOSITION OF THE CASES IN WHICH BOOKMAKING ARRESTS WERE MADE DURING THE INVESTIGATION IN QUESTION

Petitioners contend that the trial court committed prejudicial error in denying the defense the right to introduce in evidence the disposition of those cases in which arrests were made on March 20, 1964, for bookmaking in the course of the investigation in question. (Petition, p. 42.)

Respondent submits that this contention, too, does not involve a substantial federal question.

Under California law the determination as to whether offered evidence is relevant is a matter for the trial court's discretion. *People v. Tahl,* 65 Cal. 2d 719, 740 (1967) [423 P.2d 246, 259], *cert. denied,* 389 U.S. 942.

The scope of the trial court's discretion was broad, and it is clear from the opinion of the Court of Appeal that it was not an abuse of this discretion for the trial court to exclude the evidence in question (Rep. Tr. pp. 1703, 1706):

> "Defendants predicate error on the trial court's denial of their request to introduce evidence concerning the ultimate dispositions of the various cases in which arrests were made for bookmaking during the March 20th raids. The court correctly ruled against allowing in such evidence. The results of the investigation were admitted to show the nature of the places the telephone numbers of which Stafford and De Maddalena had in their

notebooks. Whether the occupants of those places were subsequently tried and convicted of bookmaking (or were acquitted, or had their cases dismissed), depended on such extraneous factors as the technical rules of evidence or whether guilt was proven beyond a reasonable doubt, matters having no relevancy to the issues of this case."

People v. Canard, supra, 257 A.C.A. 500, 521 (1967) [65 Cal. Rptr. 15, 29].

Conclusion

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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